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No. 09-1461

Supreme Court, U.S.
FILED
SEP 17 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of University of California, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY TO STATEMENT OF THE CASE

I. UC Cannot and Does Not Deny that Its Vice President in Charge, Its Policy on Religion and Ethics Courses, Its Stated Reason for Rejecting 150 Courses, and Its Pleadings Say It Disapproved Courses With Standard Content that Add a Religious Viewpoint. Instead, UC Tries To Obscure Its Viewpoint Discrimination by the Rational Basis Test and by False Claims that UC's Policies Are "Academically Reasonable" and Do Not "Substantially Burden Petitioners."

The relevant evidence is undisputed about UC rejecting courses with standard content if they add a religious viewpoint; consequently UC studiously ignores it and hopes this Court will too. That undisputed evidence of viewpoint discrimination falls in four categories: (a) sworn statements of UC's officer in charge of course review, (b) UC's "Policy on Religion and Ethics Courses," (c) "more than 150 courses rejected by UC" for added religious perspectives (to use the district court's enumeration, App.103a),[1] and

[1] Contrary to UC's n.7, the rejected "150 courses" quotes the district court's and Ninth Circuit's (App.103a, 9a-10a) enumeration of courses identified in the first compilation (ER750-77). Most were also in the second compilation (ER443-86). The relevant question was whether they were rejected for added religious viewpoints, in whole or part, which was proved by the compilations and expert witness declarations (ER498-504, 524-28, 672-88, 957-58, 233-56, 285-99, 323-56, 360-85). It was not ACSI's burden to prove the 150 courses should have been approved, but that analysis *was* provided. (*Id.*) The compilations were admissible under Fed.R.Evid.1006, and the lower courts did not exclude them or accept UC's inadmissibility argument. The second compilation quoted *all* UC's stated grounds for rejection (ER443-86). Both cited only exhibits filed with the district court (some at ER1981-2454; all at docket nos.72-74, 219-

(d) UC's own descriptions of its policy. Each is a UC admission of a policy or practice of viewpoint discrimination:

(a) UC's Vice President Susan Wilbur testified that a course will be rejected if it "provides all standard material on the subject" and, "in addition, provides a Christian perspective" as the only added viewpoint. (ER969.) She applied that principle to government (*id.*), English (ER967-68), science (ER1528), and other courses. She also declared a policy, complete with form rejection letter, that history courses will be disapproved, even if they have standard content, if they "attribut[e] historical events to supernatural causes." (ER2027.) Although facially viewpoint discriminatory, the Ninth Circuit totally ignored Wilbur's directives.

UC does not dispute that Wilbur was the UC officer over course review, that she testified and wrote as quoted, or that UC staff reviewers rejected courses on the grounds she declared.

(b) UC's "Policy on Religion and Ethics Courses" expressly rejects "courses in religion or ethics" that, even if exemplary in standard content, are "limited to one. . . viewpoint." (ER1485.) UC admits that "most of the disputed religion courses" were rejected on this basis (Opp.14, App.111a), including ethics and philosophy courses, even though such courses are otherwise approved as elective courses. Although the policy is viewpoint discriminatory on its face, the Ninth Circuit found it not discriminatory. (App.4a.)

UC does not dispute that this was a policy (Opp.14, App.111a), or that UC follows the policy to

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20, 223-24).

reject courses that add a single religious viewpoint.

(c) UC's rejections of more than 150 courses gave as reasons their addition of a religious viewpoint--and generally not any deficiency in standard content. UC assures this Court that "if UC disapproves a course, it explains why" (Opp.4), and it did. Examples were given in Petition 6-10, such as a course being evaluated as "pretty good" except for its "Catholic point of view." (Pet.7, ER2369.) All 150 wrongful rejections were quoted in compilations (ER443-86, 750-77), and were filed in the district court as exhibits (n.1 *supra*). The Ninth Circuit, while refusing to apply the overbreadth doctrine or to discuss a single course, flatly denied that UC has a policy or practice of rejecting courses for added religious viewpoints (App.4a), and effectively ruled that this policy or pattern of viewpoint discrimination does not violate the First Amendment. Its only reason was some UC-approved courses with religious content and textbooks, but most dated from before the mid-2004 implementation of UC's policy (ER2413) or from after the mid-2005 deescalation of that policy following the filing of this lawsuit.

UC does not dispute that the 150 courses were rejected, or that all reasons for rejection were accurately quoted in a compilation (ER443-86), or that those reasons were added religious viewpoints in whole or part.

(d) UC has repeatedly admitted in its pleadings that, under its policy or practice, it rejects courses in any academic discipline that "include supernatural or religious explanations." (Opp.11 n.9.) It says "a course may be unsatisfactory precisely *because* it is too narrow or includes only one viewpoint," that "supernatural or religious explanations. . . as overriding

explanations. . . may interfere with teaching the subject" and warrant rejection, and that "UC considers whether a viewpoint or perspective. . . promotes or detracts from a course's ability to meet faculty's expectations." (UC 9th Cir. Br.25.) Thus, UC claims that its course review "*may* make **viewpoint** distinctions" and must evaluate the "**viewpoints** of academic expression." (Opp.29, 26.)

Finding this clear policy or practice of viewpoint discrimination to be irrefutable, though highly embarrassing, UC diverts the discussion to the irrelevant trifles of whether its general course review approach is "reasonable" and "not inconsistent with petitioners' religion" (Opp.5-7). Those are inapposite to whether UC's directives, policies, and practices are viewpoint discrimination, and whether the relevant test is the reasonable basis test. In the process, UC savagely quotes ACSI's expert witnesses out of context, as they found its review of mere course descriptions meaningless like judging books by covers.

II. UC Ignores Its Own Stated Reasons for Rejecting the Five Calvary Courses, and Instead Tries to Replace Them with Post Hoc Rationales.

UC gives every imaginable post hoc rationalization for its course rejections, while not mentioning its actual stated reasons because they unavoidably show its viewpoint discrimination.

A. Elective Course (Religion, Ethics, Philosophy)

UC's stated reason for rejecting Calvary's elective course (religion) was, along with minor points, the school must "demonstrate how the course treats the study of religion from the standpoint of scholarly inquiry." (ER2193.) As UC admits, this language

meant demonstrating how the course was "consistent with UC's Policy on Religion and Ethics Courses" (which falsely dichotomizes "scholarly inquiry" and "one. . . viewpoint"). (ER1172; *see* Opp.14.) Thus, rejection was required by UC's Policy on Religion and Ethics Courses (ER1485), which rejects "courses in religion or ethics" that, regardless of standard content, are "limited to one. . . viewpoint." (Pet.11, 7; ER1485, 1996.) Calvary's course taught standard content. (ER361-62.) Similarly, UC rejected religion courses of Cantwell/Sacred Heart of Mary High School (App.40a), because it added only a Catholic viewpoint and "need[ed] other prospectives [*sic*]" (ER1664).

UC's pretext, created three years later in expert testimony, that it merely follows "the scholarly approach" of disallowing single religious viewpoints is fallacious. There are *two* scholarly approaches (ER2214), the other of which adds the university's viewpoint in not just seminaries but religiously-affiliated universities like Notre Dame, Catholic University, and Princeton. (ER2205-13, Ex.653-55, ER669.)

B. Social Science

UC understandably skips over Calvary's government course (Pet.18).

UC's single stated reason for rejecting the government course was the added religious viewpoint in the text: "Textbook is not appropriate. One sided presentation of history curriculum; needs balance." (ER2007.) Rejection was mandated by UC's policy or practice of rejecting "an American government course [that] provides all standard material on the subject. . . accurately, and in addition, provides a Christian perspective" (Pet.11, 8; ER969), in vivid

contrast to UC's policy approving courses with "a particular [secular] perspective, such as African-American history, Woman's history, or the Latin American Experience." (ER1408.) Calvary's course taught standard content and skills. (ER233-38.)

C. English

UC's stated reason for rejecting Calvary's English course was it "does not offer a non-biased approach" (its added religious perspective) (ER2051) and the text "insists on specific interpretations" (again the added perspective) (SER0427). Rejection was required by UC's policy or practice of rejecting "an English course [that] provides all standard material on English or literature, and in addition, provides a Christian perspective." (Pet.12 n.5, 9; ER967-68.)

UC's reason was not the pretext it fabricated three years later. Calvary's course and its text provided standard content and critical skills (as ACSI's expert testified, ER285-88, 955-58, 285-88, 260-85), and included the required two full-length works (ER512-13).

D. History/Course with Providential Viewpoint

UC's single stated reason for rejecting Calvary's history course was its added religious viewpoint: "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) Rejection was demanded by UC's policy or practice of rejecting history courses with standard content that "attribut[e] historical events to supernatural causes," as stated in UC's form letter. (Pet.12 n.5, 9-10; ER2027.)

UC's reason was not the pretexts it concocted three years later about standard content, as shown by even *its* expert witness testifying the course should have been approved. (ER912.) Standard con-

tent was acceptably taught in the first text (as ACSI's expert testified, ER746-47, 1134-38, 233-37), and was assured by the second text, which was widely used in UC-approved courses, written by America's leading historian of religion. (ER1983, 1987, 2457.)

Because these and other courses were rejected in part for unconstitutional reasons, it is immaterial whether UC can come up with post hoc permissible reasons. *E.g., Board of Educ. v. Pico,* 457 U.S.853, 875 (1982); *Bakke*, 438 U.S. at 320 n.54.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling, that Effectively Upholds Viewpoint Discrimination by State Universities and Agencies against Religious Speech in Private Schools As Not Violating the First Amendment, Cannot Be Disguised by an Assertion that Vice President Wilbur's Directives, The Policy on Religion and Ethics Courses, the 150 Course Rejections, and UC's Descriptions Were Not a Viewpoint Discriminatory Policy of Rejecting Courses with Standard Content that Add a Religious Viewpoint. It Conflicts with the Seventh, Eight, Tenth, and Fourth Circuits That Find Similar Actions To Be Viewpoint Discriminatory.

UC makes frenzied repetition of its strategic mantra that there is no policy or practice, that no course has been rejected for adding a religious viewpoint.

UC is claiming and practicing power to conduct viewpoint discrimination. UC argues that its course review, and government generally whose "mission by its nature requires evaluations of speech, . . . *may* make **viewpoint** distinctions that *are* reasonably in furtherance of that mission," and "must have the discretion to evaluate the means, content, and **viewpoints** of academic expression." (Opp.29, 26; UC 9th Cir. Br.40, 32.) Recognizing and upholding that claim, the district court held that UC officials "necessarily **facilitate some viewpoints** over others in judging the excellence of those students applying," and may reject courses "out of rational concern about the **academic merit of those religious viewpoints**." (App.25a, 102a.)

The Ninth Circuit tried to evade a ruling as overt as the district court's by falsely asserting that there was no viewpoint discrimination, but unavoidably ruled that UC's actions were not viewpoint discrimination. In doing so, the Ninth Circuit implicitly held that it is not viewpoint discrimination for UC (as described in undisputed evidence above): (a) to reject courses that "provide[] all standard material on the subject" and "in addition, provide[] a Christian perspective," or that "attribut[e] historical events to supernatural causes," as directed by Vice President Wilbur (ER969, 967-68, 1528, 2027); (b) to reject courses that, despite otherwise approvable standard content, are "limited to one. . . viewpoint," as it expressly upheld (App.4a) UC's Policy on Religion and Ethics Courses (ER1485); (c) to reject 150 courses based on stated reasons consisting of their added religious viewpoints and not their standard content; and (d) to assert power and right to "make **viewpoint** distinctions" (Opp.29, 26).

In substance, the Ninth Circuit and UC claim that UC is free from the general principle that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 394 (1993).

B. The Ninth Circuit's Ruling that Only the Minimal Rational Basis Test Must Be Met by Infringements of Freedom of Speech and Other First Amendment Protections When Government Provides a Public Service Conflicts with Decisions of This Court and the Fourth, Seventh, and Eighth Circuits, and Warrants Granting the Petition.

1. The Ninth Circuit Ruling that Viewpoint Discrimination Is Permissible under a Mere Rational Basis Test When "Government Provides a Public Service That . . . Requires . . . Distinctions Based on the Content of Speech" Conflicts with This Court and Other Circuits.

The Ninth Circuit's holding that the rational basis test applies to much, if not most, First Amendment exercise, including claims of viewpoint discrimination or content discrimination (App.2a), is outrageous.

The Ninth Circuit's holding, and UC's argument, that rational basis scrutiny applies to discrimination against speech when "government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech" (App.2a, Opp.23), is a blank slate inviting every governmental program to self-commission a need for "evaluations of and distinctions based on the content of speech," just as UC did.

2. The Ninth Circuit's Vast Extrapolation of the *Finley-ALA-Forbes-Hazelwood* Exception and Its Rational Basis Test, from Government Selection among Speech To Subsidize to "Government Provid[ing] a Public Service" and to Regulation of Private Speech, and from Content-Based Decisions to Viewpoint Discrimination, Conflicts with This Court's Decisions.

The Ninth Circuit vastly expanded the narrow *ALA-Finley-Forbes-Hazelwood* exception and its rational basis test, from government selection among speech to subsidize, into whenever "government provides a public service that, by its nature, requires

evaluations of and distinctions based on the content of speech" and into private speech. (App.2a.)

UC asks this Court to extend *ALA-Finley-Forbes-Hazelwood* and its rational basis test still further, to allow viewpoint discrimination. UC claims it "must have the discretion to evaluate the means, content, and **viewpoints** of academic expression," and that whenever "government's mission by its nature requires evaluations of speech, it *may* make **viewpoint** distinctions that *are* reasonably in furtherance of that mission." (Opp.26, 29.) Each of those four decisions expressly forbids viewpoint discrimination (Pet.30), and certainly does not authorize it upon showing a rational basis. Further, UC fabricates a distinction between "invidious" viewpoint discrimination and (fictional) other viewpoint discrimination.

The *ALA-Finley-Forbes-Hazelwood* exception and its minimal scrutiny is not a weapon waiting to be fired against the First Amendment, but a limited exception for government selection among speech that it subsidizes--library offerings, art grants, public television programs, and public high school newspapers. While these may involve content discrimination in that narrow area, they do not authorize content discrimination with a rational basis among private speech or whenever a public service "by its nature, requires evaluations of and distinctions based on the content of speech." Nor does the exception allow viewpoint discrimination at all, instead forbidding it. (Pet.30.) Expanding the *ALA-Finley-Forbes-Hazelwood* exception to private speech and other governmental programs would assault and abridge its First Amendment rights. No circuit but the Ninth Circuit has permitted that.

UC, forcing a square peg into a round hole, de-

scribes its course review as entirely voluntary and optional. (Opp.30.) In reality, private schools are effectively forced to apply for course approval because they would have few students if students were automatically ineligible for regular admission to any of California's state colleges (UC or CSU), and many students are effectively forced to apply because the California state colleges are affordable while out-of-state colleges or private colleges are far more expensive. This is not choice, but unavoidable regulation.

UC's unpersuasive response to the circuit conflict is to claim that the unconstitutionality of viewpoint discrimination in three forum decisions is irrelevant to nonforum cases, and that the particular viewpoint discriminations in three nonforum decisions differ from this case (though *Roach* and *Wigg* similarly involve private speech). All six decisions find illicit viewpoint discrimination in single instances of what here occurred in 150 instances.

C. The Ninth Circuit's Rulings that Rejected the Facial Challenge, Refused To Apply the Overbreadth Doctrine, and Constrictively Reinterpreted the Association Standing Test, Wrongly Led It To Ignore UC's Policy or Practice of Rejecting Courses That Add a Religious Viewpoint to Standard Content. Its Rulings Conflict with Decisions of This Court and Other Circuits (Including by Then-Judge Alito), and Warrant Granting the Petition.

UC's policy or practice of rejecting courses with standard content but added religious viewpoints should have been found unconstitutional on the facial challenge, but UC's actions were upheld; and that policy or practice should have been identified

under the overbreadth doctrine, but that was refused. Instead, the district court's rejection of the facial challenge was on the ground that viewpoint discrimination is permissible if there is a mere rational basis, and its rejection of the as-applied challenge (App.42a, 12a) reiterated refusal to consider any practice or courses under the overbreadth doctrine or under ACSI's associational standing (except five Calvary courses). These holdings were appealed, affirmed (App.3a-4a, 4a-6a), and raised by the Petition, including the Ninth Circuit's refusal to apply the overbreadth doctrine and rewriting of the associational standing test (App.9a-10a, 5a).

1. Refusing To Use the Overbreadth Doctrine.

UC's Opposition does not even attempt to defend the Ninth Circuit's refusal to use the overbreadth doctrine, nor could it in view of conflict with this Court's decisions. (App.38a.)

2. Reinterpreting the Association Standing Test.

The Ninth Circuit's and UC's linchpin in refusing associational standing is that claims and relief "both require 'individualized proof' specific to each rejected course and school." (App.5a, Opp.33.) However, this Court and other circuits (including then-Judge Alito's opinion in *Hospital Council*) do not deny associational standing where "participation of *some* members" is necessary, and the claims and relief do not require participation of *all* members or *all* members with rejection challenges. Here, all course applications and UC rejections were strictly documentary and are in the record, and all relief requested is common declaratory and injunctive relief that UC's policy or practice is unconstitutional of rejections because of added religious viewpoints.

Respectfully submitted,

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